

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOYCE LATTIN,
Plaintiff,

Civil No. 05-6152-AA
OPINION AND ORDER

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant.

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AIKEN, Judge:

Claimant, Joyce Lattin, brings this action pursuant to the

1 Social Security Act (the Act), 42 U.S.C. §§ 405(g), 1383(c)(3), to
2 obtain judicial review of a final decision of the Commissioner.
3 The Commissioner denied plaintiff's application for Disability
4 Insurance Benefits (DIB) under Title II of the Social Security
5 Act, and for Supplemental Security Income (SSI) disability
6 benefits under Title XVI of the Act. *Id.* For the reasons set
7 forth below, the Commissioner's decision is affirmed and this
8 case is dismissed.

9 **PROCEDURAL BACKGROUND**

10 Plaintiff protectively filed her application for DIB and
11 SSI benefits on March 7, 2002. She alleged an inability to work
12 beginning June 28, 1992, due to lupus, fibromyalgia, arthritis,
13 diabetes mellitus, and kidney problems. Tr. 45-46, 56. Her date
14 last insured was December 31, 1997. Tr. 13. A claimant seeking
15 disability insurance benefits must establish that she was
16 disabled on or before her date last insured. See 20 C.F.R. §§
17 404.131, 404.315-21. Plaintiff must prove that she was disabled
18 on or before December 31, 1997, in order to be eligible for DIB
19 under Title II.

20 In September 2002, plaintiff's applications were denied
21 initially, tr. 25-29, and in March 2002, upon reconsideration.
22 Tr. 31-33. On February 16, 2005, after a hearing, the
23 Administrative Law Judge (ALJ) ruled that plaintiff was not
24 disabled. Tr. 10-20. The Appeals Council, denied plaintiff's
25 request for review. Tr. 4-7. The ALJ's decision thus became the
26 final agency decision. See 20 C.F.R. §§ 404.981, 416.1481,
27 422.210 (2005). On May 19, 2005, plaintiff filed the complaint
28 at bar.

STATEMENT OF THE FACTS

Born in 1951, plaintiff was 40 years old on the alleged disability onset date of October 10, 1992, and 52 years old at the time of the hearing. Tr. 46, 10-20. Plaintiff graduated from high school, and has past work experience as a clerk, video store manager, and sales representative. Tr. 95, 103.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. *Bowen v.*

1 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
2 416.920. First the Secretary determines whether a claimant is
3 engaged in "substantial gainful activity." If so, the claimant
4 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
5 §§ 404.1520(b), 416.920(b).

6 In step two the Secretary determines whether the claimant
7 has a "medically severe impairment or combination of
8 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
9 §§ 404.1520(c), 416.920(c). If not, the claimant is not
10 disabled.

11 In step three the Secretary determines whether the impairment
12 meets or equals "one of a number of listed impairments
13 that the Secretary acknowledges are so severe as to preclude
14 substantial gainful activity." Id.; see 20 C.F.R.
15 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
16 presumed disabled; if not, the Secretary proceeds to step four.
17 Yuckert, 482 U.S. at 141.

18 In step four the Secretary determines whether the claimant
19 can still perform "past relevant work." 20 C.F.R.
20 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
21 disabled. If she cannot perform past relevant work, the burden
22 shifts to the Secretary. In step five, the Secretary must
23 establish that the claimant can perform other work. Yuckert, 482
24 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
25 (f). If the Secretary meets this burden and proves that the
26 claimant is able to perform other work which exists in the
27 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
28 416.966.

DISCUSSION

Based on the 5-Step Sequential Process outlined above, the ALJ found at Step One that plaintiff was not engaged in "substantial gainful activity" since her alleged onset date of disability. Tr. 19. At Step Two, the ALJ found that plaintiff had the following "severe" impairments: obesity, non-insulin dependent diabetes mellitus, and systemic lupus erythematosis. *Id.* Findings by the ALJ at Steps One and Two are not in dispute.

At Step Three, the ALJ found that these medically determinable impairments did not meet or equal one of the listed impairments. This Finding is in dispute. The ALJ next determined the plaintiff's residual functional capacity. See 20 C.F.R. §§ 404.1520(e), 404.1545, 416.920(e), 416.945. The ALJ determined that plaintiff could perform light work, that she could stand or walk for four to six hours in an eight hour work day, that she should never climb ladders, ropes, or scaffolds or work at heights or around dangerous machinery, and that she could occasionally climb stairs or ramps, stoop, crouch, crawl, or kneel. Tr. 20. This determination is in dispute.

At Step Four, the ALJ found that plaintiff was able to perform her past relevant work as a video store manager, cashier, and sales representative. Tr. 20. This Finding is also in dispute. Finally, at Step Five, because the ALJ found that plaintiff could perform her past relevant work at Step Four, he did not consider whether plaintiff could perform other work existing in significant numbers in the national economy.

Plaintiff argues that the ALJ erred when he: (1) failed to give clear and convincing reasons for rejecting the September

1 2004 disability opinion of Dr. Muller, plaintiff's treating
2 physician; and (2) rejected plaintiff's testimony as not
3 credible.

4 1. Opinion of Dr. Muller

5 Plaintiff saw Dr. Muller beginning February 1992, and again
6 in January and March 1993. In March 1993, Dr. Muller opined that
7 plaintiff had done "quite well" after a course of physical
8 therapy, that her pedal edema was "resolved," that her shoulder
9 had just a "little bit of tenderness," and that her neck had only
10 "a little bit of decrease in range of motion." Tr. 304.
11 Finally, Dr. Muller recommended that plaintiff swim to increase
12 her range of motion, control her weight, decrease her blood
13 pressure, and improve her physical conditioning. Id.

14 Plaintiff did not see Dr. Muller again for any impairment-
15 related problem for three years, until May 1996, when he stated
16 that her weight was 216 pounds, she had no sign of significant
17 rheumatoid disease, and she had multiple tender points on her
18 back and shoulder. Tr. 302. Dr. Muller diagnosed possible
19 fibromyalgia, bloating, abdominal pain, hair loss, and sinus
20 congestion. Id. Dr. Muller then treated plaintiff for gout in
21 one of her right toes in October 1996, but x-rays showed no other
22 foot abnormalities. Tr. 301.

23 Dr. Muller next treated plaintiff in January 1998, when she
24 reported "she now no longer has any swelling" and "felt
25 marvelous." Tr. 301. In June 1998, Dr. Muller diagnosed
26 plaintiff with hypertension. Tr. 300. In September 1998,
27 plaintiff reported that edema occurred "quite rarely" and Dr.
28 Muller opined that "her joints seem to be much improved with the

1 use of prednisone." Id. In December 1998, Dr. Muller diagnosed
2 plaintiff with lupus with kidney, joint, and eye manifestations,
3 and prescribed Plaquenil. Tr. 298.

4 In January 1999, Dr. Muller opined that plaintiff was
5 "doing pretty well," had no recent eye irritations, and that her
6 joints, except for her right shoulder, felt better. Tr. 297.
7 Later in January 1999, plaintiff reported right foot pain and
8 left eye "floaters" and right eye dilation. Tr. 297. In March
9 1999, plaintiff reported that a right shoulder steroid injection
10 "instantly" helped and Dr. Muller stated that "now she is able to
11 lift things and do exercises without any difficulties." Tr. 296.
12 Dr. Muller stated that Plaquenil "has really helped a lot with
13 her functionality" and that despite the lupus, her joints were
14 "okay." Id.

15 In May 1999, Dr. Muller diagnosed plaintiff with benign
16 positional vertigo and stated that her diabetes and hypertension
17 were stable. Tr. 299. In June 1999, Dr. Muller opined that "she
18 has not been having any significant problem" from lupus. Tr.
19 296. In September 1999, plaintiff reported she had more energy
20 and a better attitude. Id. Dr. Muller stated that plaintiff's
21 glucose levels were stable, she had no joint swelling, no vision
22 problems, and that she had improved after she exercised more and
23 dieted. Id.

24 Plaintiff was not treated by Dr. Muller in 2001. In March
25 2002, plaintiff's cervical x-ray showed "straightening of the
26 normal curvature consistent with spasm," but no acute fractures
27 or dislocations. Tr. 394. In April 2002, Dr. Muller opined that
28 plaintiff's hypertension and diabetes were largely stable, but

1 she reported feeling depressed and feeling "crumby" as a result
2 of lupus. Tr. 248. In June 2002, a kidney ultrasound showed
3 "mild" pyelocaliectasis (dilation of the calices, usually due to
4 obstruction or infection). In August 2002, plaintiff reported
5 right upper quadrant pain, but a colonoscopy showed no
6 significant problems. Tr. 278. Again in August 2002, based on
7 plaintiff's reported right Achilles tendon pain, Dr. Muller
8 diagnosed her with tendonitis, but opined that her lupus was
9 "reasonably well controlled." Tr. 245. In February 2003,
10 plaintiff reported that she had no visual difficulty when driving
11 and no night vision problems, but she reported difficulty
12 reading. Tr. 233.

13 In February 2003, orthopedist Dr. Hobson, examined
14 plaintiff, who weighed 240 pounds and was in no apparent
15 distress. Tr. 261. He opined that her upper and lower
16 extremities were normal with the exception that her right ankle
17 had "some swelling," although her right foot had "good motor and
18 sensory function." Id. Dr. Hobson interpreted plaintiff's right
19 foot x-rays to show Achilles tendonitis, recommended a right foot
20 walker with a heel lift, and planned for her to begin physical
21 therapy in six weeks. Id.

22 In April 2003, Dr. Muller opined that plaintiff was doing
23 "reasonably well" with diabetes, had "okay" vision, and that her
24 right Achilles tendon was "somewhat stiff," but noted that she
25 did ankle range of motion exercises. Tr. 276. In June 2003,
26 plaintiff's blood sugars were "running excellently," and she was
27 "doing better" on collagen hydrolysate, but she reported heel
28 pain consistent with plantar fascia irritation. Tr. 274. In

September 2003, Dr. Muller opined that plaintiff's lupus and diabetes were "doing reasonably well" and plaintiff reported no right foot problems. Tr. 271. In November 2003, Dr. Muller opined that plaintiff's hypertension was "stable" and stated that her pain and tenderness from lupus decreased with use of indocin. Tr. 268.

Plaintiff submitted no further records from Dr. Muller, and presumably did not see him after November 2003. In September 2004, however, Dr. Muller completed a form at the request of plaintiff's counsel which stated as follows:

11 1. What are the diagnoses?

12 Systemic lupus Erythematosis

12 NIDDM [non-insulin dependent diabetes mellitus]

13 HTN [hypertension]

14 2. What are the objective medical findings upon
14 which the diagnoses are based?

15 Physical Exam

15 Laboratory values

16 Consultation

17 3. What are the symptoms?

17 Arthralgia

18 Fatigue

18 Joint swelling

19 4. Are the conditions capable of causing these
19 symptoms?

20 Yes

21 5. In your opinion, based upon the above definition
21 [of sedentary and light work], is [plaintiff]
22 capable of light work?

22 No.

23 Lifting is okay, but walking is not possible due to
23 joint swelling, pain, and decreased mobility.

24 6. If, in your opinion, [plaintiff] is not capable
24 of light work, would she be capable of a full range
25 of sedentary work?

26 No.

27 I feel she could not even do 2 hrs. of walking/standing
27 in a shift.

28 ///

1 7. Is [plaintiff] unable to sustain work activity
2 on a full-time basis in either the sedentary or
3 light work categories due to the exacerbation of
4 her medical condition?

5 [Yes,] Unable to sustain either sedentary or light work.

6 Tr. 406-07.

7 The ALJ must provide specific and legitimate reasons to
8 reject a treating physician's contradicted opinion of disability,
9 and clear and convincing reasons for rejecting uncontradicted
10 treating physician's opinions. Magallanes v. Bowen, 881 F.2d
11 747, 751 (9th Cir. 1989).

12 The ALJ rejected Dr. Muller's September 2004, disability
13 assessment because he found "no documentation of any medication
14 treatment other than January 2004 chemical panels, since November
15 2003." Tr. 17. Further, the ALJ found that pursuant to Dr.
16 Muller's September 2, 2003, report, "plaintiff presented with 'no
17 particular problems' as her hypertension, lupus, and diabetes
18 were all seen as being controlled 'reasonably well.'" Id. The
19 ALJ noted that during Dr. Muller's August and September, 2003
20 examinations/reports, plaintiff's "hypertension, blood sugars,
21 and even weight were all seen to be 'running excellently[.]'"
22 The ALJ accorded Dr. Muller's opinion that plaintiff would be
23 precluded from walking or standing even 2 hours, and unable to
24 perform even sedentary work, "less weight as they lack durational
25 support of objective signs and laboratory findings, even within
26 the treatment notes and reports of that same physician." Id.

27 The ALJ rejected Dr. Muller's 2004 disability opinion
28 because: (1) plaintiff received no medical treatment after
 November 2003; (2) Dr. Muller's last examination of plaintiff was
 benign; and (3) Dr. Muller's opinion that plaintiff could not

1 stand or walk for even two hours a day was unsupported by his own
2 treatment record. Tr. 14-18. During plaintiff's last two
3 physical examinations, neither Dr. Muller nor plaintiff mentioned
4 any difficulty in her ability to stand or walk. Tr. 17, 18, 268,
5 271. In September 2003, plaintiff's extremities were "without
6 cyanosis, her lupus, hypertension, and diabetes were all non-
7 problematic, and Dr. Muller planned "[j]ust reassurance" and to
8 "[c]ontinue all medications." Tr. 271.

9 Essentially, after plaintiff's application for benefits was
10 denied, and without ever re-examining plaintiff, Dr. Muller
11 responded to plaintiff's attorney that plaintiff was unable to
12 perform even sedentary work. Tr. 406-07. An opinion solicited
13 after an individual is found not disabled is not persuasive,
14 particularly when it is inconsistent with earlier statements.
15 Weetman v. Sullivan, 877 F.2d 20, 23 (9th Cir. 1989).

16 Further, the ALJ relied on Dr. Hobson's February 2003,
17 orthopedic examination which contradicted Dr. Muller's disability
18 opinion. Tr. 18. See 20 C.F.R. §§ 404.1527(d)(5),
19 416.927(d)(5) ("we generally give more weight to the opinion of a
20 specialist about medical issues related to his or her area of
21 speciality[.]"). Plaintiff told Dr. Hobson that she did not ice
22 her foot, had not done physical therapy, and did not wear a brace
23 and that heat, elevation and rest improved the right heel pain.
24 Tr. 260. Dr. Hobson, an orthopedic specialist, opined that
25 plaintiff's lower extremities had normal alignment, range of
26 motion, strength, and stability, except that she had "some
27 swelling" of her right ankle and that her right Achilles tendon
28 was tender. Tr. 261. Dr. Hobson diagnosed plaintiff with

1 tendonitis, which he treated "in the acute phase" with a foot
2 walker and icing. Id. Dr. Hobson recommended that plaintiff
3 begin physical therapy in about six weeks. Id. An examining
4 doctor's opinion constitutes substantial evidence in support of
5 an ALJ's decision. Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
6 Cir. 2001).

7 The ALJ also partially relied on opinions from Drs. Kehrli
8 and Eder, non-examining physicians who opined that plaintiff
9 could perform light work with some limitations. Tr. 18, 235-38.
10 A non-examining physician's opinion may amount to substantial
11 evidence as long as other evidence in the record supports those
12 findings. Tonapetyan, 242 F.3d at 1149. The ALJ actually found
13 that plaintiff's residual functional capacity was more limited
14 than Drs. Kahrli and Eder assessed. The ALJ also limited
15 plaintiff from working around hazards, climbing ladders, ropes or
16 scaffolds, and from working at heights. Tr. 20.

17 In conclusion I find that the ALJ rejected Dr. Muller's
18 opinion because it was inconsistent with other evidence; and it
19 was not well supported by medically acceptable clinical and/or
20 laboratory diagnostic studies. Tr. 14-18. The ALJ adequately
21 analyzed the evaluations and other opinion evidence that
22 contradicted Dr. Muller's opinion. Id. The ALJ then provided
23 specific and legitimate reasons to reject Dr. Muller's disability
24 opinion. Tr. 17-18.

25 2. Plaintiff's Testimony

26 The ALJ found that plaintiff was not totally credible. Tr.
27 17-18. In assessing a plaintiff's credibility, an ALJ may
28 consider: (1) ordinary techniques of credibility evaluation, such

1 as prior inconsistent statements concerning the symptoms and
2 testimony by the plaintiff that appears less than candid; (2)
3 unexplained failure to seek treatment; (3) daily activities; and
4 (4) medical evidence which discounts the severity of subjective
5 claims. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th Cir.
6 2001).

7 Specifically, an ALJ may discredit a plaintiff's subjective
8 complaints by identifying inconsistencies between her complaints
9 and activities of daily living. Thomas v. Barnhart, 278 F.3d
10 947, 958-59 (9th Cir. 2002). In discrediting plaintiff's
11 subjective complaints, the ALJ noted that plaintiff here engaged
12 in cooking, shopping, housekeeping, laundry, self-grooming
13 activities, reading, watching TV, computer/internet activities
14 30 - 120 minutes at a time, exercise on her stationary bike three
15 times per week, gardening 1 - 1 ½ hours at a time, and driving.
16 Tr. 18. Plaintiff reported that her chores were done "very
17 well," and that she cared for her pet "adequately." Id., tr. 80-
18 81, 88-90, 443, 448-49. The ALJ found plaintiff's reported
19 activities of daily living inconsistent with disability and
20 therefore the ALJ properly discredited plaintiff's subjective
21 complaints.

22 An ALJ may also consider a lack of supporting objective
23 medical evidence as a factor in discrediting a plaintiff's
24 subjective complaints. Thomas, 278 F.3d at 958-59. The ALJ
25 summarized the medical evidence and noted that plaintiff had "no
26 documentation of any medication treatment other than January 2004
27 chemical panels, since November 2003." Tr. 17. The ALJ also
28 found that plaintiff "presented with 'no particular problems' as

1 her hypertension, lupus, and diabetes were all seen as being
2 controlled 'reasonably well.'" Tr. 17, 271. Finally, the ALJ
3 noted that plaintiff did not report Achilles tendon problems
4 after April 2003. Tr. 17.

5 Despite the fact that plaintiff selected June 1992 as her
6 alleged disability onset date, the ALJ noted that this was
7 "apparently based on surgical procedures" performed at that time
8 and that thereafter, she recovered and continued to drive and
9 engage in a wide range of daily activities. Tr. 17-18. It was
10 not until plaintiff had been denied disability benefits that her
11 treating physician completed plaintiff's attorney's form and
12 stated that she could not perform even sedentary work. Tr. 406-
13 07. The ALJ conducted an extensive review of the record and
14 found that the examining, treating and reviewing sources through
15 2003 did not opine that plaintiff was disabled, or support that
16 level of disability. The lack of objective medical evidence, as
17 noted by the ALJ here, to find that plaintiff's subjective
18 complaints were not totally credible is one appropriate factor,
19 among others, in the credibility analysis. The ALJ's finding
20 that plaintiff was not totally credible was supported by the lack
21 of objective medical evidence and by the inconsistencies between
22 her complaints and her activities of daily living.

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CONCLUSION

The Commissioner's decision is based on substantial evidence, and is therefore, affirmed. This case is dismissed.

IT IS SO ORDERED.

Dated this 21 day of February 2006.

/s/ Ann Aiken

Ann Aiken

United States District Judge